

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DOMESTIC CONSTRUCTION, LLC,

Plaintiff,

V.

BANK OF AMERICA, N.A.,

Defendant/Third- Party Plaintiff,

V.

IDEAL SERVICES, INC.,

Third-Party Defendant/Fourth- Party Plaintiff,

V.

KERMIT MILLS and JANE DOE
MILLS, and the marital community
comprised thereof,

Fourth-Party Defendants,

CASE NO. C07-5357BHS

ORDER GRANTING
DEFENDANT BANK OF
AMERICA'S MOTION FOR
SUMMARY JUDGMENT AND
DENYING PLAINTIFF'S
MOTION FOR PARTIAL
SUMMARY JUDGMENT
FINDING THAT BANK OF
AMERICA ACTED
NEGLIGENCELY

This matter comes before the Court on Defendant Bank of America's Motion for Summary Judgment (Dkt. 120) and Plaintiff's Motion for Partial Summary Judgment (Dkt. 124) concerning that Bank of America Acted Negligently (Dkt. 124). The Court has considered the briefings filed in support of and in opposition to the motions and the remainder of the record and hereby grants Defendant's motion and denies Plaintiff's motion for the reasons herein.

I. PROCEDURAL HISTORY

On December 12, 2006, Plaintiff Domestic Construction, LLC, (“Domestic”) filed a complaint in the United States District Court for the Middle District of Louisiana against Defendant Bank of America. Dkt. 52-4. Plaintiff requests damages for violations of common law conversion, negligence, failure to act in accordance with reasonable commercial standards, the Uniform Commercial Code (“UCC”), and bad faith. *Id.*

In February of 2007, Defendant answered the complaint and filed a third-party complaint against Third-Party Defendant Ideal Services, Inc. (“Ideal”). Dkt. 52-11. Defendant alleges that Ideal may be liable for breach of warranty under UCC 3-416 and UCC 4-207, conversion, unjust enrichment, intentional or negligent misrepresentation, contribution/indemnity, and equitable indemnification. *Id.*

On July 16, 2007, the matter was transferred to this Court and assigned to the undersigned. Dkts. 52-55.

On December 4, 2007, Ideal answered the third-party complaint, filed a cross-claim against Plaintiff, and filed a fourth-party complaint against Fourth-Party Defendants Kermit Mills and Jane Doe Mills. Dkt. 66.

On March 3, 2008, Plaintiff answered Ideal's cross-claim and filed a counterclaim against Ideal. Dkt. 73.

On June 24, 2009, Defendant filed a Motion for Summary Judgment (Dkt. 120) and Third-Party Defendant Ideal filed a Motion for Summary Judgment (Dkt. 125). On July 13, 2009, Plaintiff responded to both motions. Dkt. 131. On July 17, 2009, Defendant replied (Dkt. 138) and Ideal replied (Dkt. 139).

On June 24, 2009, Plaintiff filed a Motion for Partial Summary Judgment Finding that Bank of America Acted Negligently. Dkt. 124. On July 13, 2009, Defendant responded. Dkt. 132. Plaintiff did not reply.

II. FACTUAL BACKGROUND

On October 5, 2004, Kermit Mills registered Domestic Construction, LLC, with the Louisiana Secretary of State. Dkt. 131-2, Declaration of Kermit Mills (“Mills Decl.”), ¶ 2. In late 2004 or early 2005, Kermit Mills approached Ray Salzer regarding “the possibility of selling a non-controlling interest in Domestic Construction, LLC.” *Id.* ¶¶ 3-5. At that time, Mr. Salzer was the president of Ideal and Sue Erb was the controller of Ideal. Dkt. 125 at 4.

The parties dispute whether an agreement or partnership was ever formed between either Mr. Salzer or Ideal and Plaintiff. Although Mr. Mills and Mr. Salzer exchanged multiple proposed agreements, it is undisputed that they did not sign a final business agreement. They did, however, engage in various construction projects based on oral representations and provisions of those proposed agreements. For example, in his deposition, Mr. Mills stated that:

[Mr. Salzer] was supposed to handle everything and at the end of day [sic], we were supposed to be splitting 49/51 percent profit of the company with all upfront stuff . . . supposed to be done by Ray Salzer for Domestic.

Dkt. 121, Declaration of William K. Rasmussen (“Rasmussen Decl.”), Exh. 1, Deposition of Kermit Mills (“Mills Dep.”), at 354-55 (deposition pagination). Moreover, in the 30(b)(6) deposition of Domestic, Mr. Mills stated that Ideal obtained insurance for Domestic, maintained a bond for Domestic, and opened credit accounts in the name of “Ideal d/b/a Domestic Construction.” Dkt. 126, Declaration of Christina Gerrish Nelson (“Nelson Decl.”), Exh. B.

On March 25, 2005, Mr. Mills sent Mr. Salzer and Ms. Erb a brochure for Domestic. Under the "Company Information" section, the brochure reads in part as follows:

Domestic Construction was founded by Kermit Mills (former Vice-President of operations and project manager) who brings over 13 years of experience to the construction industry. Domestic Construction LLC was formed to become a one stop source for retailers. In order to provide our clients the entire services they require under one entity, Kermit Mills teamed up with Ray Salzer, owner of Ideal Services and Ricky Davis,

1 owner of Alpheaus Davis, House of Colors and Boley Designs as a joint
2 venture to form Domestic Construction LLC, a general contractor and
3 construction firm. With offices located in Louisiana as well as the Pacific
4 Northwest region, Domestic Construction LLC is a diversified construction
5 company developing expertise in a wide range of areas allowing us to
6 operate with a reputation for dependability.

7 Nelson Decl., Exh. C. Under the “Company Contacts” section, Mr. Mills is listed as
8 President and Mr. Salzer is listed as President of Northwest Operations. *Id.*

9 In June 2005, Domestic filed a Foreign Limited Liability Company Registration
10 with the Washington Secretary of State. Dkt. 134, Second Declaration of Christina
11 Gerrish Nelson, Exh. A. The Initial Annual Report cover sheet lists Mr. Mills, Mr.
12 Salzer, and Ms. Erb as members of the foreign LLC. *Id.* On October 2, 2006, the
13 Secretary of State revoked Domestic’s authority to do business in Washington. *Id.*

14 In their briefing on the pending dispositive motions, Domestic and Mr. Mills claim
15 that “whether [Mr.] Mills and [Mr.] Salzer formed some type of partnership or joint
16 venture is simply irrelevant and constitutes a red herring . . .” Dkt. 131 at 4. In his
17 declaration that was submitted in opposition to Defendant’s and Ideal’s motions, Mr.
18 Mills maintains that he was the sole member of Domestic. Mills Decl. ¶ 9. Moreover, he
19 claims that he “has never had any intention of forming a partnership between himself and
20 Ray Salzer or Ideal Services, Inc.” *Id.* ¶ 13. Although Mr. Mills admits that, in the
21 course of business, he referred to Mr. Salzer as his partner, Mr. Mills claims that he was
22 merely using “informal vernacular.” *Id.* ¶ 16.

23 It is undisputed that, at all relevant times, both Domestic and Ideal had bank
24 accounts with Defendant. Defendant has submitted its agreement with Domestic that is
25 titled “Business Financial Relationship Agreement.” Rasmussen Decl., Exh. C. The
26 document lists three persons under the “Deposit Account Signature Card” portion: Susan
27 Erb, Mr. Salzer, and Mr. Mills. *Id.* All three signed the document in two separate places.
28 *Id.*

29 Defendant has also submitted Ideal’s account agreement and Ideal’s Washington
30 Business License. *Id.*, Exhs. D, E. The agreement lists Mr. Salzer and Ms. Erb as

1 authorized persons on the accounts, and one of the FirstChoice Business accounts is titled
2 “Domestic Con.” *Id.*, Exh. D. With regard to the business license, one of Ideal’s
3 registered trade names was “Domestic Construction.” *Id.*, Exh E.

4 Over the next year or so, Domestic (using Ideal’s employees) performed
5 construction projects for Home Depot and other companies. All costs were fronted by
6 Ideal, with the expectation and understanding that Ideal would be paid back for all such
7 costs. *See* Mills Dep. at 238, 275, 497. Moreover, all accounting and related financial
8 operations for Domestic were handled by Mr. Salzer and Ms. Erb out of an office in
9 Tacoma, Washington, which was in the same office space used by Ideal. *See* Mills Dep.
10 at 74-76, 80-81, 438-439. Home Depot paid for some of the projects with checks that
11 were payable to “Domestic Construction, LLC.” *See id.*, Exh F. These checks were
12 deposited over a four-month time period from February to May of 2006. *Id.* Under the
13 endorsement portion of these checks, it reads “Pay to the Order of Bank of America . . .
14 For Deposit Only, Ideal Services Inc. Accounts Payable.” *Id.*

15 III. DISCUSSION

16 A. Summary Judgment Standard

17 Summary judgment is proper only if the pleadings, the discovery and disclosure
18 materials on file, and any affidavits show that there is no genuine issue as to any material
19 fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).
20 The moving party is entitled to judgment as a matter of law when the nonmoving party
21 fails to make a sufficient showing on an essential element of a claim in the case on which
22 the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323
23 (1985). There is no genuine issue of fact for trial where the record, taken as a whole,
24 could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec.*
25 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must
26 present specific, significant probative evidence, not simply “some metaphysical doubt”).
27 *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if

1 there is sufficient evidence supporting the claimed factual dispute, requiring a judge or
2 jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477
3 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d
4 626, 630 (9th Cir. 1987).

5 The determination of the existence of a material fact is often a close question. The
6 Court must consider the substantive evidentiary burden that the nonmoving party must
7 meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477
8 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual
9 issues of controversy in favor of the nonmoving party only when the facts specifically
10 attested by that party contradict facts specifically attested by the moving party. The
11 nonmoving party may not merely state that it will discredit the moving party's evidence at
12 trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec.*
13 *Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, nonspecific
14 statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan*
15 *v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

16 **B. Domestic - Ideal Relationship**

17 Under the Washington Uniform Partnership Act, a partnership is formed by “the
18 association of two or more persons to carryon as co-owners of a business for profit . . . ,
19 whether or not the persons intend to form a partnership.” RCW 25.05.055(1). The act
20 defines persons to include “an individual, corporation, . . . limited liability company,
21 association, joint venture, . . . agency, or instrumentality, or any other legal or commercial
22 entity.” RCW 25.05.005(10).

23 The formation of a partnership is not dependent upon a formal contract. *See*
24 *Roediger v. Reid*, 133 Wn. 608 (1925). The fundamental test for determining the
25 existence of a partnership is whether it was the intention of the parties to form a
26 partnership as manifested in their express agreements, statements, and conduct. *Minder v.*
27 *Gurley*, 37 Wn.2d 123, (1950).

1 Washington law also recognizes joint ventures, which are similar to partnerships
2 but are limited to particular transactions or projects. *Pietz v. Indermuehle*, 89 Wn. App.
3 503, 510 (1998). Because a joint venture is in the nature of a partnership, “[t]he relations
4 of the parties in each of such associations are so similar that their rights, duties, and
5 liabilities are generally tested by the same rules.” *Barrington v. Murry*, 35 Wn.2d 744,
6 752 (1950) (citing *Paulson v. McMillan*, 8 Wn.2d 295 (1941)).

7 In this case, both Defendant and Ideal argue that there was either a partnership or
8 joint venture between Domestic and Ideal. Dkt. 120 at 7-10; Dkt. 125 at 10-15. All
9 admissible evidence in the record establishes the existence of a joint venture between
10 Domestic and Ideal to complete certain construction projects. Even Mr. Mills stated that
11 he and Mr. Salzer were “to be splitting 49/51 percent profit of the company with all
12 upfront stuff . . . supposed to be done by Ray Salzer for Domestic.” Moreover, the public
13 records as well as the banking documents list Mr. Salzer and Ms. Erb as officers or
14 members of Domestic.

15 The only evidence in the record that contradicts the finding that a joint venture
16 existed is Mr. Mills’ declaration that was submitted in opposition to the dispositive
17 motions. However, the statements set forth in that declaration are insufficient evidence
18 for at least two reasons. First, the Court may disregard the portions of Mr. Mills’
19 declaration that are contrary to his prior deposition testimony. *See Foster v. Arcata*
20 *Associates, Inc.*, 772 F.2d 1453, 1462 (1985), *overruled on other grounds by Kennedy v.*
21 *Allied Mutual Ins. Co.*, 952 F.2d 262 (9th Cir. 1991). Second, under Washington
22 partnership laws, the Court must consider Mr. Mills’ *express* agreements, statements and
23 conduct. *See Minder, supra*. Even if Mr. Mills never intended to engage in a joint
24 venture or accidentally used “informal vernacular” in describing his business relationships
25 to third parties, Domestic and Ideal were carrying on a business for profit. Domestic,
26 through Mr. Mills, provided the business contacts with Home Depot while Ideal, through
27 Mr. Salzer, fronted the money for and completed the relevant construction projects. Most
28

1 importantly, there was an agreement to split the profits of the business endeavor. Thus,
2 Mr. Mills' contradictory, subjective assertions are irrelevant as to the question of whether
3 his manifested expressions conveyed that Domestic and Ideal engaged in a joint venture.

4 Plaintiff also argues that "there is a question of fact as to whether a partnership
5 was formed which is properly determined by the jury." But Plaintiff fails to articulate
6 what evidence creates that alleged question of fact. Its burden as the nonmoving party is
7 to produce evidence supporting the claimed factual dispute. *See Matsushita, supra.*
8 Moreover, Plaintiff may not merely rely on the assertion that there is a factual dispute "in
9 the hopes that evidence can be developed at trial to support the claim." *See T.W. Elec.
Serv., supra.* Plaintiff has failed to meet its burden on this issue.

10 Therefore, the Court finds that, based on the admissible evidence in the record,
11 there was at least a joint venture between Domestic and Ideal to complete certain
12 construction projects in the state of Washington.

13 **C. Defendant Bank of America's Motion for Summary Judgment**

14 Defendant moves for summary judgment on four independent grounds. Dkt. 120
15 at 3-4. The Court will address (1) whether the acts of Ideal bind Domestic in the joint
16 venture and (2) whether Mr. Salzer and/or Ms. Erb had actual, implied, and apparent
17 authority.

18 **1. The Joint Venture**

19 Defendant requests that the Court enter summary judgment in its favor because all
20 of Plaintiff's claims depend on the erroneous allegation that Defendant improperly
21 accepted the checks that were payable to Domestic but endorsed by Ideal. Dkt. 120 at 3.
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23 Under the Washington Uniform Partnership Act, the act of each partner binds the
24 partnership. The relevant portion of the statute reads as follows:

25 Each partner is an agent of the partnership for the purpose of its
26 business. An act of a partner, including the execution of an instrument in
27 the partnership name, for apparently carrying on in the ordinary course the
28 partnership business or business of the kind carried on by the partnership
binds the partnership, unless the partner had no authority to act for the
partnership in the particular matter and the person with whom the partner

1 was dealing knew or had received a notification that the partner lacked
2 authority.

3 RCW 25.05.100(1).

4 In this case, Defendant argues that the acts of Ideal in endorsing the checks and
5 depositing them into its account bind the Domestic/Ideal joint venture. The Court agrees.
6 Handling payments for the construction projects were acts in the ordinary course of
7 business for the Domestic/Ideal joint venture. Moreover, the banking agreements in the
8 record show that Mr. Salzer and Ms. Erb had authority to deposit checks on behalf of
9 either Domestic or Ideal. There is no evidence in the record that Defendant knew or had
10 reason to know that Mr. Salzer or Ms. Erb lacked authority to deposit checks on behalf of
11 the joint venture. Therefore, the checks in question were neither fraudulently transferred
12 nor improperly negotiated because they were deposited by a party involved in the
13 Domestic/Ideal joint venture and into an account controlled by a party of the
14 Domestic/Ideal joint venture.

15 The Court grants Defendant Bank of America's motion for summary judgment and
16 dismisses all of Plaintiff's claims against Defendant.

17 **2. Actual, Implied, and Apparent Authority**

18 The UCC authorizes indorsements (a subset of "signatures") to be made in a
19 representative capacity, which are effective and binding on the principal. Specifically,
20 RCW 3-401 (titled "Signature") provides that:

21 (a) A person is not liable on an instrument unless (i) the person
22 signed the instrument, or (ii) the person is represented by an agent or
representative who signed the instrument and the signature is binding on the
represented person under RCW 62A.3-402.

23 RCW 62A.3-401(a).

24 RCW 62A.3-402 provides in pertinent part that:

25 (a) If a person acting, or purporting to act, as a representative
26 signs an instrument by signing either the name of the represented person or
the name of the signer, the represented person is bound by the signature to
the same extent the represented person would be bound if the signature
were on a simple contract. If the represented person is bound, the signature
of the representative is the "authorized signature of the represented person"

1 and the represented person is liable on the instrument, whether or not
2 identified in the instrument.

3 RCW 62A.3-402(a).

4 “Signature includes an indorsement.” Comment 1 to UCC 3-401. Signatures can
5 take many forms:

6 A signature may be made (i) manually or by means of a device or
7 machine, and (ii) by the use of any name, including a trade or assumed
8 name, or by a word, mark, or symbol executed or adopted by a person with
9 present intention to authenticate a writing.

10 RCW 62A.3-401(b)

11 In this case, Defendant argues that Mr. Salzer and Ms. Erb ‘had actual, implied,
12 and apparent authority to endorse the checks and deposit them into the Ideal Services
13 account at Bank of America.’ Dkt. 120 at 10. The most compelling evidence in support
14 of this argument is that:

15 Mr. Salzer and [Ms.] Erb were listed as signers on the Domestic signature
16 card, and Domestic Construction was listed as a dba trade name on the Ideal
17 Services signature card, all before any of the Home Depot checks were
18 issued

19 Dkt. 138 at 6. Plaintiff counters that “Mills never authorized [Ms.] Erb or [Mr.] Salzer to
20 divert checks written to Domestic Construction, LLC into an account held solely by
21 IDEAL.” Dkt. 131 at 22. Regardless of specific instructions, Mr. Mills did represent to
22 Defendant that Ms. Erb and Mr. Salzer were authorized to act on behalf of Domestic.
23 Moreover, the year-long course of dealing between the parties with Mr. Salzer and/or Ms.
24 Erb handling the financial transactions in Washington shows that they had at least
25 apparent authority to bind Domestic to these transactions.

26 Therefore, the Court also grants Defendant’s motion on the grounds that Ms. Erb
27 and/or Mr. Salzer had actual, apparent, or implied authority to deposit the checks in
28 question.

29 **D. Plaintiff’s Motion for Partial Summary Judgment**

30 Plaintiff requests that a “finding that depositing checks written to Domestic
31 Construction, LLC into an account held by Ideal Services, Inc. was *per se* negligent.”

1 Dkt. 124 at 2 (emphasis in original). The Court, however, has found that the checks were
2 neither fraudulently transferred nor improperly negotiated. Plaintiff's arguments to the
3 contrary are meritless. Moreover, Plaintiff's citations are factually and legally
4 distinguishable from the record before the Court. Therefore, Plaintiff's motion is denied.

5 **IV. ORDER**

6 Therefore, it is hereby

7 **ORDERED** that Defendant Bank of America's Motion for Summary Judgment
8 (Dkt. 120) is **GRANTED** and Plaintiff's Motion for Partial Summary Judgment Finding
9 that Bank of America Acted Negligently (Dkt. 124) is **DENIED**.

10 DATED this 26th day of August, 2009.

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BENJAMIN H. SETTLE
United States District Judge
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